(3)

FILED
NOV 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-260

In the Supreme Court of the United States

OCTOBER TERM, 1987

GENERAL DYNAMICS LAND SYSTEMS, INC., PETITIONER

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AND ITS LOCAL 1200, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

MARY-HELEN MAUTNER
Counsel for Appellate Litigation

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

HPP

QUESTION PRESENTED

Whether compliance with a safety and health standard setting an eight-hour time weighted exposure limit for a particular toxic compound (freon) relieves an employer of its general duty under the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1), to maintain a workplace "free from recognized hazards * * * likely to cause * * * serious physical harm," with regard to the short-term exposure of employees to freon in confined spaces.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Brennan v. *Butler Lime & Cement Co.*, 520 F.2d 1011 (7th Cir. 1975)	8, 9
Brock v. *L. R. Willson & Sons, Inc.*, 773 F.2d 1377 (D.C. Cir. 1985)	8, 9
Con Agra, Inc., 11 O.S.H. Cas. (BNA) 1141 (1983)	4, 6, 9, 10
Donovan v. *Adams Steel Erection, Inc.*, 766 F.2d 804 (3d Cir. 1985)	9-10
Usery v. *Marquette Cement Mfg.*, 568 F.2d 902 (2d Cir. 1977)	8
Whirlpool Corp. v. *Marshall*, 445 U.S. 1 (1980)	7

Statutes and regulations:

Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*:	
§ 2(b), 29 U.S.C. 651(b)	1-2
§ 5(a)(1), 29 U.S.C. 654(a)(1)	2
§ 5(a)(2), 29 U.S.C. 654(a)(2)	2
§ 6(b), 29 U.S.C. 655(b)	2
29 C.F.R.:	
Section 1910.5(c)(1)	5
Section 1910.5(f)	5, 7, 8, 9
Section 1910.1000	2, 3, 9
Section 1910.1000(a)	9
Section 1910.1000(a)(2)	2
Table Z-1	2
Section 1910.1000(e)	9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-260

GENERAL DYNAMICS LAND SYSTEMS, INC., PETITIONER

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AND ITS LOCAL 1200, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court appeals (Pet. App. E1-E19) is reported at 815 F.2d 1570. The opinion of the administrative law judge (Pet. App. C1-C22), and the final order of the Occupational Safety and Health Review Commission (Pet. App. D1), are unreported.

JURISDICTION

The judgment of the court of appeals was entered April 14, 1987. A timely petition for rehearing and suggestion for rehearing en banc was denied on June 18, 1987 (Pet. App. F1-F2). The petition for a writ of certiorari was filed on August 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Occupational Safety and Health Act of 1970 (OSH Act) seeks "to assure so far as possible * * * safe

and healthful working conditions" (29 U.S.C. 651(b)), by prohibiting two distinct categories of violations. The OSH Act requires, under its so-called "general duty clause," that "[e]ach employer * * * furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" (29 U.S.C. 654(a)(1)). In addition, it requires employers to comply with specific occupational safety and health standards promulgated by the Secretary of Labor (29 U.S.C. 654(a)(2), 655(b)).

The Secretary has promulgated an occupational safety and health standard for certain toxic and hazardous air contaminants, including freon vapors (1,1,2-Trichloro 1,2,2-trifluoroethane). See 29 C.F.R. 1910.1000. Under this standard, employers must ensure that no employee's exposure to freon exceeds 1000 parts per million parts of air on a time weighted average for any eight-hour work period (29 C.F.R. 1910.1000(a)(2) and Table Z-1). The standard does not set any limits for short-term exposure to freon or for exposure to freon in confined spaces without special entry procedures (see *ibid.*).

2. Petitioner, General Dynamics Land Systems Division, manufactures M-1 Abrams battle tanks at a Department of Defense facility (Pet. App. E3). For over a year, petitioner had its employees use a freon solvent in cleaning up the spills that resulted during the assembly process of these tanks (*id.* at E3-E4). The solvent, however, tended to accumulate in confined spaces such as assembly line pits and tank hulls and, because it displaced oxygen, created a risk of asphyxiation, depression of the central nervous system, irregular heart beat, and even cardiac arrest for employees working in these areas (*id.* at E3). Thus, in August 1982, one of petitioner's employees was overcome by freon vapors after entering a tank assembly-line pit (*id.* at E4); in March 1983, another employee became dizzy

and weak after driving a fully assembled tank (*id.* at E5); in July 1983, yet another employee working inside a tank lost consciousness after several gallons of freon were poured onto the tank floor and the only exit from the tank was blocked (*ibid.*); and, in September 1983, still another employee was discovered inside the driver's compartment of a tank, unconscious and "shaking and foaming from the mouth" (*id.* at C5-C6, E6).

Following the September 1983 incident, respondent United Auto Workers filed a complaint with the Department of Labor (DOL) (Pet. App. E6). After conducting an investigation,[1] the DOL cited petitioner for violating the general duty clause of the OSH Act—by requiring employees to enter (without a specific confined space entry procedure) M-1 tank compartments after freon had been sprayed or poured into them, thereby exposing those employees to the hazard of asphyxiation and/or chemical poisoning (*id.* at A2-A6, E6). The DOL also cited petitioner for violating the Secretary's specific freon standard—by exposing the employee injured in the September 1983 incident to levels of freon in excess of the eight-hour time weighted average set forth in 29 C.F.R. 1910.1000 (Pet. App. A2-A7, E6).

3. An administrative law judge (ALJ) of the Occupational Safety and Health Review Commission (OSHRC) vacated both aspects of the citation (Pet. App. C1-C22). The ALJ refused to rule whether the Secretary's evidence supported the allegation that petitioner had violated the general duty clause of the statute (*id.* at C9). He reasoned that, "under the Act, a citation alleging violation of section 5(a)(1) [*i.e.*, the general duty clause,] is inappropriate if the hazard is addressed by a standard" (*id.* at C11) and

---

[1] While the DOL was conducting its investigation, another employee of petitioner died from exposure to solvent fumes (Pet. App. E6).

that "the circumstances of this case are governed solely by the regulations at 29 C.F.R. 1910.1000(a)-(d) which set forth the limits of employee exposure to trichloro trifluoroethane" (*id.* at C12). The ALJ recognized (*id.* at C11) that, in *Con Agra, Inc.*, 11 O.S.H. Cas. (BNA) 1141, 1145 (1983), the OSHRC had held that "[t]he failure to test in a confined atmosphere before possible exposure of employees to toxic substances is a violation distinct from a continued exposure to known quantities of substances listed in section 1910.1000." But the ALJ concluded that "[t]he foregoing exception is not applicable," stating that the employee injured in the September 1983 incident had ventilated the tank, and that "the air contaminants standard deals fully and completely with the hazard at issue, which is employee use of trichloro trifluoroethane in production of the M1 tank" (Pet. App. C11). Finally, he held that the Secretary had failed to prove that the air contaminants standard had been violated (*id.* at C19-C20). The ALJ's decision was subsequently adopted as the OSHRC's final order, after no Commissioner called for a further review of the decision (*id.* at D1).

4. The court of appeals vacated the OSHRC's order dismissing the general duty clause aspect of the citation (Pet. App. E1-E19). The court identified the question for decision as "whether, as a matter of law, [petitioner's] compliance with the freon standard relieved it of responsibility for alleged violations of the statute's general duty clause" (*id.* at E8-E9). It emphasized (*id.* at E10) that the case did *not* involve a challenge "to any [Occupational Safety and Health Administration (OSHA)] regulation, but rather a challenge to the [OSHRC's] interpretation of particular OSHA regulations." The court then held that OSHRC had "erred in its construction of OSHA's regulations" and, in the alternative, that OSHRC had "acted arbitrarily and capriciously in refusing to follow its own precedent" (*id.* at E8).

The court began by noting that "Section 5(a)(1) [of the OSH Act] clearly [and unambiguously] imposes on an employer a general duty to provide for the safety of his employees that is distinct and separate from the employer's duty, under section 5(a)(2), to comply with [the] administrative safety standards promulgated under section 6 of the Act" (Pet. App. E12). Thus, the court said (*id.* at E13-E14) that "the Act does not empower the Secretary, and hence OSHA, to absolve employers who observe specific standards from duties otherwise imposed on them by the general duty clause." Construing the language of 29 C.F.R. 1910.5(f) (Pet. App. E12), which provides that an employer in compliance with a specific OSHA standard "shall be deemed to be in compliance" with the "general duty clause," "but only to the extent of the condition, practice, means, method, operation, or process covered by the standard," the court disagreed with the ALJ's conclusion that 29 C.F.R. 1910.5(f) relieved petitioner of its duty to provide a workplace free from recognized hazards.[2]

Rather, the court found that "[a]ny apparent conflict between section 5(a)(2) or the preemption regulations on the one hand, and the general duty clause on the other, is resolved when one focuses on the words 'recognized hazard' in section 5(a)(1)" (Pet. App. E14). These words, it said, indicate that, "if an employer knows that a specific standard will not protect [its] workers against a particular hazard, his duty under section 5(a)(1) will not be discharged no matter how faithfully he observes that standard" (*id.* at E15).

---

[2] For the same reason, the court also rejected petitioner's argument (Pet. App. E13-E14) that it was relieved of its responsibilities under the general duty clause by another of the Secretary's regulations, 29 C.F.R. 1910.5(c)(1), which provides that a standard "specifically applicable to a condition, practice, means, method, operation, or proc-

The court then undertook tc determine whether petitioner had knowledge that its alleged observance of the freon standard would not protect its workers against the cited hazards (Pet. App. E14-E15). The court was unable to do so, however, since the ALJ had held that the cited hazards were addressed by the specific standard (*id.* at E16). The court disagreed with the ALJ, noting that, "[w]hile the regulation places a limit on the permissible level of time-weighted exposure to freon vapors over an eight-hour work shift, the hazard described in the citation * * * refers to the danger, in confined spaces requiring special entry procedures, of short-term exposure to toxic vapors in concentrations that may displace oxygen" (*id.* at E17). Accordingly, the court concluded that "the ALJ should have determined whether the description of the hazard was accurate; and, if so, whether [petitioner] had knowledge of the hazard" (*ibid.*).

In the alternative, the court held (Pet. App. E17-E19) that the ALJ had failed adequately to explain why it did not follow the OSHRC's holding in *Con Agra*. The court could not "discern any material difference between the circumstances alleged in this case and those in *Con Agra*" (*id.* at E18). Nor did it believe that *Con Agra* could be so easily distinguished, noting that "its holding is not confined by a focus on the particular facts about challenged employer practices" (*id.* at E19). Rather, the court said, "*Con Agra* correctly makes the larger point that[,] when an employer is aware of a hazard that is not in fact addressed by a specific standard, then of necessity that standard cannot be deemed to have preempted his obligation under the general duty clause" (*ibid.*).

---

ess, * * * shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process * * *."

ARGUMENT

The court of appeals reached the correct result in this case. Its decision does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner first contends (Pet. 8-9, 11-20) that the decision below invalidates and effectively replaces 29 C.F.R. 1910.5(f) with a preemption regulation of the court's own devising. This contention is meritless.

a. The court of appeals plainly did not invalidate the Secretary's preemption regulation. The court stated quite explicitly (Pet. App. E10) that the case did *not* involve a challenge "to any OSHA regulation, but rather a challenge to the [OSHRC's] interpretation of particular OSHA regulations." Moreover, the court construed 29 C.F.R. 1910.5(f) in a way that resolved "[a]ny apparent conflict between section 5(a)(2) or the preemption regulations on the one hand, and the general duty clause on the other * * *" (Pet. App. E14). Thus, there is no basis for suggesting that 29 C.F.R. 1910.5(f) has been invalidated.

b. Nor did the court of appeals replace 29 C.F.R. 1910.5(f) with a preemption regulation of the court's own devising.[3] The preemption regulation applies only where compliance with a safety or health standard adequately addresses a particular hazard attributable to a specific substance. It does not alter the employer's statutory obligation to eliminate serious, recognized hazards from the workplace, which is "mandatory [and] independent of the specific health and safety standards to be promulgated by the Secretary" (*Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13 (1980)).

---

[3] Petitioner errs in suggesting (Pet. 9-10, 12 n.5, 13-14) that, in the proceedings below, the Secretary took the position that 29 C.F.R. 1910.5(f) allowed an employer to rely on an *inadequate* safety or health standard to defeat its obligations under the general duty clause. The Secretary took no such position.

c. In any event, even if the preemption regulation applies whenever a specific standard fails to provide adequate protection, the result below is still correct. 29 C.F.R. 1910.5(f) states that compliance with a specific standard "shall be deemed to be in compliance" with the general duty clause "only to the extent of the condition, practice, means, method, operation, or process covered by the standard." The court of appeals correctly found (Pet. App. E16) that "the hazard alleged in the statutory charge is distinguishable from that addressed by the freon standard." Specifically, it said (*id.* at E17) that, "[w]hile the regulation places a limit on the permissible level of time-weighted exposure to freon vapors over an eight-hour work shift, the hazard described in the citation is both broader and more specific than that described in the regulation."[4] Thus, under the plain language of the preemption regulation, it is clear that petitioner has not been relieved of its obligations under the general duty clause.[5]

---

[4] The court's conclusion is plainly correct. In setting only a maximum, eight-hour, time weighted exposure limit, the freon standard addresses only the hazard of cumulative exposure to the substance over a normal work shift. It sets no short-term limit to protect against brief, sudden exposures to very high levels of freon, even though such levels may result in severe toxic reactions or may displace oxygen, creating a risk of asphyxiation or fatal cardiac arrest in confined spaces. See Pet. App. C20, E3. Thus, it is "unsupported and counterintuitive" (*Brock* v. *L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1382 (D.C. Cir. 1985)) to conclude, as the ALJ concluded (Pet. App. C11), that the freon standard deals "fully and completely" with the use of freon in petitioner's production of M1 tanks (*id.* at E16-E17).

[5] Petitioner errs in suggesting (Pet. 9, 13) that the decision below conflicts with the decisions of the Second Circuit in *Usery* v. *Marquette Cement Mfg.*, 568 F.2d 902 (1977), and the Seventh Circuit in *Brennan* v. *Butler Lime & Cement Co.*, 520 F.2d 1011, 1017 n.9 (1975). In *Marquette Cement Mfg.*, the court held that the OSHRC erred when it refused to allow the Secretary to amend the complaint to charge the employer with a violation of the general duty clause in

2. Petitioner next suggests (Pet. 9-10, 21-29) that the court below erred in holding that OSHRC acted arbitrarily and capriciously in failing to follow its *Con Agra* decision. Of course, this holding was an alternate ground for the decision below, and thus makes no difference to the outcome of this case. In any event, the holding is correct.

In *Con Agra*, the Secretary issued a citation against a grain elevator company whose employees regularly entered grain-laden railroad cars containing pesticide fumes. The employer responded that it was in compliance with 29 C.F.R. 1910.1000's limits on air contaminants. The OSHRC held that the "failure to test in a confined atmosphere before possible exposure of employees to toxic substances is a violation distinct from a continued exposure to known quantities of substances listed in section 1910.1000" (*Con Agra*, 11 O.S.H. Cas. (BNA) at 1145).

Petitioner suggests (Pet. 22-26) that *Con Agra* is distinguishable from the present case because petitioner here was cited for violating 29 C.F.R. 1900.1000(e). But that section merely prescribes protective measures for the limits established in 29 C.F.R. 1900.1000(a), a section that addresses only the hazards relating to weighted-average exposure to freon over an eight-hour work shift. Since 29 C.F.R. 1900.1000(a) does not apply to the dangers of entering confined spaces with potentially toxic atmospheres, neither can 29 C.F.R. 1900.1000(e). And 29 C.F.R. 1900.1000(a)'s silence with respect to such hazards cannot be treated as an intent to leave them unregulated. See, *e.g.*, *L.R. Willson*, 773 F.2d at 1382; *Donovan* v. *Adams Steel Erection, Inc.*, 766 F.2d 804, 810 (3d Cir.

---

addition to a specific standard violation. In *Butler Lime*, the court set aside an OSHRC decision vacating a citation that was based on an alleged violation of a specific standard. Thus, neither of these decisions finds preemption based on an interpretation of 29 C.F.R. 1910.5(f).

1985). Thus, the fact that petitioner has been cited for violating 29 C.F.R. 1900.1000(e) is not a basis for distinguishing *Con Agra*.

Nor can *Con Agra* be distinguished (Pet. 26-29) on the ground that petitioner's tanks, unlike the railroad cars in *Con Agra*, are not confined spaces. The ALJ declined to rule on this issue (Pet. App. C9), and thus, as the court of appeals recognized (*id.* at E19), this is a factual question that must be addressed on remand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

MARY-HELEN MAUTNER
Counsel for Appellate Litigation

EDWARD D. SIEGER
Attorney

NOVEMBER 1987

U.S. GOVERNMENT PRINTING OFFICE 1987—202 037/60104